

No. 23-1890

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

TAMER MAHMOUD AND ENAS BARAKAT; JEFF AND SVITLANA ROMAN;
CHRIS AND MELISSA PERSAK, IN THEIR INDIVIDUAL CAPACITIES AND EX
REL. THEIR MINOR CHILDREN; AND KIDS FIRST, AN UNINCORPORATED
ASSOCIATION,

Plaintiffs-Appellants,

v.

MONIFA B. MCKNIGHT, IN HER OFFICIAL CAPACITY AS
SUPERINTENDENT OF THE MONTGOMERY COUNTY BOARD OF
EDUCATION; THE MONTGOMERY COUNTY BOARD OF EDUCATION; AND
SHEBRA EVANS, LYNNE HARRIS, GRACE RIVERA-OVEN, KARLA
SILVESTRE, REBECCA SMONDROWSKI, BRENDA WOLFF, AND JULIE
YANG, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF
EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court for the
District of Maryland, Southern Division, No. 8:23-cv-1380
United States District Court Judge Deborah L. Boardman

**BRIEF OF AMICI CURIAE JEWISH COALITION FOR RELIGIOUS
LIBERTY, COALITION OF VIRTUE, ISLAM AND RELIGIOUS
FREEDOM ACTION TEAM, AND COALITION FOR JEWISH VALUES IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

HOWARD SLUGH
2400 Virginia Ave N.W. Apt. C619
Washington, D.C. 20037
(954) 328-9461
Hslugh@JCRL.org
Counsel for Amici Curiae

October 17, 2023

CORPORATE DISCLOSURE STATEMENT

Under Rules 26.1 and 29(a) of the Federal Rules of Appellate Procedure, Amici Jewish Coalition for Religious Liberty, Coalition for Virtue, Islam and Religious Freedom Action Team, and Coalition for Jewish Values certify that they are nonprofit organizations and thus have no parent corporations and no stock.

Date: October 17, 2023.

/s/____Howard Slugh____

Howard Slugh

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE ISSUE.....1

INTEREST OF AMICI CURIAE1

ARGUMENT3

 I. Many Religious Parents Recognize a Biblically Derived Obligation to
 Educate Their Children.....3

 II. The Policy of The Montgomery County Board of Education Interferes With
 This Obligation.7

CONCLUSION13

TABLE OF AUTHORITIES

Page(s)

Cases

Mahmoud v. McKnight, No. CV DLB-23-1380, 2023 WL 5487218 (D. Md. Aug. 24, 2023)7,11,12

Other Authorities

Abu Bakr al-Bayhaqi, *SHU’AB AL-IMAN*, Vol. 6 (2000)7

Amir Elshamy, *The Law of Inheritance Regarding Women and Principles Concerning the Genders in Islam*, Penn St. L. Rev.: F. Blog (Apr. 28, 2021) <https://tinyurl.com/ymtpfb4f>10

Deuteronomy 6:6-7.....3

Deuteronomy 22:5.....8

Genesis 18:193

Ismail Royer, *The Joy of Our Eyes*, MUSLIMMATTERS, (2022) <https://tinyurl.com/3e6n4ep7>.....10

Jewish Education 101, CHABAD.ORG <https://tinyurl.com/56zp7c5w>.....4,5

Jordana Birnbaum, *Shomer Negiah, the Prohibition on Touching*, MYJEWISHLARNING.COM, <https://rb.gy/0tlj3>8

Malik ibn Anas, *AL-MUDAWANA*, Vol. 1 (1994)9

Muhammad ibn Ahmad Al-Qurtubi, AL-JAMI' AL-AHKAM AL QURAN, Vol 5, 18 (1964)	6,10
Muhammad Ta'wil. <i>There is No Male-Preference in Islamic Law</i> . Trans. Abdullah Hamid Ali (2022).....	10
Muslim ibn al-Hajjaj, SAHIH MUSLIM, Trans. Nasiruddin al-Khattab. Vol. 1 (2007)	9-10
Proverbs 1:8.....	3
Qadi Muhammad ibn al-'Arabi, AHKAM AL-QURAN, Vol. 4, (2003)	6
Quran, Surah an-Najm 53:45	9
Quran, Surah at-Tahrim 66:6	6
Rabbi Doniel Neustadt, <i>Hilchos Yichud: Rulings Of Harav Moshe Feinstein</i> , TORAH.ORG, https://rb.gy/tru0h	8
Rabbi Jonathan Sacks, THE DIGNITY OF DIFFERENCE (2002)	5
Samuel J. Abrams, <i>Jews and the Faith of Their Children</i> , American Enterprise Institute (2022), https://tinyurl.com/mr2zr9rt	4,5
Talmud, Kiddushin: 30a.....	5
The Jewish Agency, <i>Parents as Educators</i> (2005), https://tinyurl.com/4hxrt5pj	3,4,5,6
<i>Transsexual Jew</i> , AISH.COM, https://aish.com/transsexual-jew/	8

The Rabbis Sacks Legacy, *Passover tells us: Teach your children well* (2011),
<https://tinyurl.com/c7b5wddn>4

Tim Mackie, *What's the Meaning of the Jewish Shema Prayer in the Bible?*,
BIBLEPROJECT,
<https://tinyurl.com/mryk97td>.....4

Women and Mitzvot, AISH.COM (May 23, 2013),
<https://aish.com/women-mitzvot/>.....8

Yehuda Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org,
<https://tinyurl.com/2zy2md6w>.....8

STATEMENT OF THE ISSUE

Whether a school policy denying parents both notice and the ability to opt-out of a storybook curriculum involving issues of family life and human sexuality that is inconsistent with parents' religious beliefs, violates those parents' right to educate their children in accordance with their faith.

INTEREST OF AMICI CURIAE¹

The Jewish Coalition for Religious Liberty is an incorporated organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty.

The mission of Coalition of Virtue is to promote virtue in society, grounded in divine guidance as embodied in the Islamic tradition, in cooperation with those who share our moral vision. COV envisions an America where families have a say in their children's education, equal opportunities are available to all, and the highest good is championed.

¹ No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

The Islam and Religious Freedom Action Team (“IRF”) of the Religious Freedom Institute serves as a Muslim voice for religious freedom grounded in the traditions of Islam. To this end, the IRF engages in research and education, and advocates for the right of everyone to believe, speak, and live in accord with their faith.

Coalition for Jewish Values (“CJV”) is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing *amicus curiae* briefs in defense of equality and freedom for religious institutions and individuals.

Each of these amici is committed to ensuring that parents can maintain a robust role in their children’s education, consistent with their religious ideals, even if they choose to send their children to public school.

ARGUMENT

I. Many Religious Parents Recognize a Biblically Derived Obligation to Educate Their Children.

The Bible teaches that parents assume a religious duty to educate their children. Indeed, the Bible explicitly prescribes to parents that “these words which I command unto you today, *you shall teach them diligently to your children*, and you shall speak of them, as you sit in your home and as you walk on your way outside, when you lie down and when you awaken.” Deuteronomy 6:6-7 (emphasis added). In fact, the theme of educating children appears even earlier than that. The first book of the Bible, Genesis, explains the significance of God having chosen to approach Abraham as follows: “For I have known him because he commands his sons and his household after him, that they should keep the way of the Lord to perform righteousness and justice.” Genesis 18:19. From the outset then, the Bible recognizes the importance of parental instruction. The obligation on parents to teach their children is further solidified by the mirror obligations on a child to “heed the discipline of your father, and [not to] forsake the instruction of your mother.” Proverbs 1:8. In short, the Bible clearly dictates that when it comes early childhood education, it is “the sphere of the home” that serves “as the basis for the child's emerging conception of the world around him.” The Jewish Agency, *Parents as Educators* (2005), <https://tinyurl.com/4hxrt5pj>.

In Judaism, the role of parental education is of unparalleled significance. This is reflected by the fact that the aforementioned Biblical prescription to teach one's children is centrally featured in the *Shema*—one of the most important daily prayers recited by Jewish people. See Tim Mackie, *What's the Meaning of the Jewish Shema Prayer in the Bible?*, BIBLEPROJECT, <https://tinyurl.com/mryk97td>. Indeed, it is the family unit that “is the major educational institution mentioned in the Bible,” and it is “the mother and father [who] were totally responsible for teaching the child the ways of the Almighty.” *Parents as Educators*. From these biblical roots, stems a rabbinic commandment—known in Judaism as a *Mitzvah*—for parents to educate their children in accordance with Torah teachings. This commandment is called *Chinuch* and begins when a child reaches the age of three. *Jewish Education 101*, CHABAD.ORG, <https://tinyurl.com/56zp7c5w>. This is why, for example, many Jewish holidays and traditions focus on “parents and elders in the community imparting Jewish values, ideas, and history to children and younger members of the community.” Samuel J. Abrams, *Jews and the Faith of Their Children*, American Enterprise Institute (2022), <https://tinyurl.com/mr2zr9rt>; see also The Rabbis Sacks Legacy, *Passover tells us: Teach your children well* (2011), <https://tinyurl.com/c7b5wddn> (explaining that the key element of the Passover Seder is the education of Children by their parents).

The importance of the *Chinuch* obligation is extensively documented in rabbinic works, and its reach extends beyond merely teaching children the dos and don'ts of Jewish Law; it entails the transmission of "morals and Jewish values." *Jewish Education 101*. The home, therefore, serves as the primary incubator of these morals and values. As the famous commentator, Rashi, quipped: "what the child speaks in the marketplace, he has heard at home from his mother or father." *Parents as Educators*. While this obligation obviously serves the immediate interests of encouraging children to live their lives according to Torah values, it also ensures that no matter the surrounding circumstances, the Jewish tradition will survive. *See* Talmud, Kiddushin: 30a ("Whoever teaches his son teaches not only his son but also his son's son---and so on to the end of generations."); *Jews and the Faith of Their Children* ("Religious ideas taught at home have anchored Jewish identity and outlook for generations."). Indeed, in describing the importance of the Jewish system of education, Rabbi Lord Jonathan Sacks explained: "It is no exaggeration to say that this lay at the heart of the Jewish ability to survive catastrophe, negotiate change and flourish in difficult circumstances." Rabbi Jonathan Sacks, *THE DIGNITY OF DIFFERENCE*, 139 (2002).

Recent works of rabbinic literature also emphasize the unique role that parents must play in their children's education. For example, noted Jewish educator Rabbi Samson Rapahel Hirsch, explains how "parents must keep in mind that there is no

substitute for the educational influence of their own example” because “the child sees in the picture of his parents' life, the shape of his life in the future.” *Parents as Educators*. This is the core of *Chinuch*; it is a religious obligation on parents to cultivate their children’s spiritual growth and raise the next generation of Torah-abiding Jews.

A similar tradition exists within the Islamic faith. The Quran states: “O you who believe! Save yourselves and your families from a fire whose fuel is men and stones” Quran, Surah at-Tahrim 66:6. This is understood to encompass an obligation to educate one’s children.

For example, Ibn Al-’Arabi (d. 1148 CE), a seminal Andalusian jurist, understood that verse to mean: “It is obligatory upon a man to rectify himself through obedience to God, and to rectify his family with the care that a shepherd would give to his flock.” Qadi Muhammad ibn al-’Arabi, *AHKAM AL-QURAN*, Vol. 4 at 300-301 (2003). The influential Quranic exegete Muhammad al-Qurtubi (d. 1273 CE), stated that this verse meant: “one should teach one’s children what is permissible and what is impermissible, and turn him or her away from acts of disobedience and sin, and so on, regarding the various rulings of the sacred law.” Muhammad ibn Ahmad Al-Qurtubi. *AL-JAMI’ AL-AHKAM AL QURAN*, Vol 18 at 194 (1964). In this connection, al-Qurtubi cites a saying of the Prophet Muhammad: “A child’s right over his father

is that his father teach him writing, swimming and archery, and to have good character.” Abu Bakr al-Bayhaqi, SHU’AB AL-IMAN, Vol. 6 at 401 (2000).

II. The Policy of The Montgomery County Board of Education Interferes With This Obligation.

The Montgomery County Board of Education’s new storybooks initiative discusses family life and human sexuality, and encourages students to question sexuality and gender identity. Given that these issues are often infused with religious significance, the School Board’s decision to deny parents notice of when the new books will be used and refusal to accommodate religious objectors’ reasonable opt-out requests, is a burden on parents’ obligation to educate their children in accordance with their understanding of Biblical ideals.

The new initiative will include over 22 LGBTQ+ texts, *Mahmoud v. McKnight*, No. CV DLB-23-1380, 2023 WL 5487218, at *2 (D. Md. Aug. 24, 2023), and require teachers to include those books in their curriculum, including by recommending these books to students and reading them aloud in class, *see id.* at *4. And as the district court concluded, these storybooks “may be viewed as endorsing particular viewpoints” on “gender identity, transgenderism, and same-sex marriage” that religious parents might find objectionable. *Id.* at *21.

Numerous Jewish and Muslim parents would indeed find the views contained in those books objectionable. Many Orthodox Jewish parents believe

that, according to their faith, it is impossible for a person to change sexes. *Transsexual Jew*, AISH.COM, <https://aish.com/transsexual-jew/>. This is a matter of serious import because many Jewish obligations relate to biological sex. There is a biblical prohibition against wearing clothing associated with the opposite sex. Deuteronomy 22:5. There is also a prohibition against affectionately touching or even remaining in a room alone with a member of the opposite sex other than a close family member. Jordana Birnbaum, *Shomer Negiah, the Prohibition on Touching*, MYJEWISHLearning.COM, <https://rb.gy/0tlj3>; Rabbi Doniel Neustadt, *Hilchos Yichud: Rulings Of Harav Moshe Feinstein*, TORAH.ORG, <https://rb.gy/tru0h>. These laws apply based on a person's biological sex and not his perceived gender. Teaching children otherwise would mislead them concerning important theological obligations.

Also, while men and women are equally obligated to obey the negative commandments (such as do not murder), women are exempt from many positive time-bound commandments. *Women and Mitzvot*, AISH.COM (May 23, 2013), <https://aish.com/women-mitzvot/>. One explanation for this distinction is that it recognizes the unique and vital roles that men and women play based on their innate biological and spiritual differences. Yehuda Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org, <https://tinyurl.com/2zy2md6w>.

The lessons contained in the new initiative contradict this teaching which Orthodox Jewish parents may want to impart to their children.

Like Judaism, Islam recognizes that each person is immutably created as male or female. *See* Quran, Surah an-Najm 53:45 (“He created the two sexes, male and female.”); *see also*, *Male, Female, or Other: Ruling of a Transgender Post Sex Change Procedures*, AMERICAN FIQH ACADEMY (May 2, 2017), <http://fiqhacademy.com/res03/>. Hence, interference by school officials in Muslim parents’ duty of passing on their beliefs and values, including Islam’s concept of sex and gender, would have profound consequences: not only on the student individually, but on the family relationship. That is because Islam involves, along with an individual dimension of belief and worship, a family and communal dimension, many aspects of which turn on the distinction between the sexes.

An example is the ritual of five daily prayers, one of Islam’s five pillars. This ritual must be performed in congregation if possible. Malik ibn Anas, *AL-MUDAWANA*. Vol. 1 at 178-79 (1994). While Muslim men must pray in a mosque if possible, a family’s congregational prayer at home is a central aspect of Muslim family life. A congregation consists of the prayer leader (imam) who stands in front, and the followers who are arranged in rows behind him. One requirement of congregational prayer is that the imam must be a male if one is present. *Id.* at 177. Moreover, the Prophet Muhammad directed that the rows of followers are

to be arranged with males in front and females in back. Muslim ibn al-Hajjaj, SAHIH MUSLIM, Trans. Nasiruddin al-Khattab. Vol. 1 at 552-53 (2007). If the school board's gender identity instruction has the intended effect of persuading a Muslim student that sex is not an immutable category, the congregational prayer aspect of the student's family life could be disrupted.

To take the most fundamental example: marriage in Islam is only between a man and a woman. Ismail Royer. *The Joy of Our Eyes*. MUSLIMMATTERS. (2022) <https://tinyurl.com/3e6n4ep7> (“[M]arriage is, by its nature, an institution ordained by God between men and women with the primary purpose of procreation, along with a rich, multilayered array of purposes such as love, companionship, and security....”) Men have the religious obligation to act as the protector and financial provider for the family, whereas women have different, complementary obligations. Al Qurtubi, Vol. 5, at 168. Rules about which parts of the body one must cover in front of certain relatives differ for men and women. *Id.*, Vol. 12, at 232-33. And when a family member dies, inheritance rules differ between males and females. Muhammad Ta'wil. *There is No Male-Preference in Islamic Law*. Trans. Abdullah Hamid Ali at 52-59 (2022); *see also*, Amir Elshamy, *The Law of Inheritance Regarding Women and Principles Concerning the Genders in Islam*, Penn St. L. Rev.: F. Blog (Apr. 28, 2021). <https://tinyurl.com/ymtpfb4f>. All of these aspects of family life would be thrown

into chaos if a Muslim student were to internalize the board of education's preferred concepts of sex and gender.

The initiative therefore makes it harder for parents to fulfill their religious mandate of educating their children according to their beliefs, and insofar as religion and the family life are interwoven, it will have an impact that penetrates into this most fundamental of institutions. This is a burden on religious exercise by any reasonable account. In seeking to avoid this manifest burden on religious exercise, the School Board presented—and the lower court accepted—two different arguments: neither withstands scrutiny.

First, the School Board suggests that the initiative does not entail actual instruction on the objectionable topics but causes at most incidental exposure. This cannot be reconciled with how the initiative is described. The School Board's own documents and instructional materials explain that the purpose of the initiative is to “help young people develop empathy for a diverse group of people and learn about identities that might relate to their families or even themselves.” *McKnight*, 2023 WL 5487218 at *5. The goal is that “[b]y learning about the diversity of gender, children have an opportunity to explore a greater range of interests, ideas, and activities.” *Id.* While that may be an admirable goal according to the School Board, it contradicts the idea that these storybooks are not meant to influence students into thinking in specific ways that may contradict

the religious instruction they receive at home. Indeed, despite claiming that the storybooks are not “about making students think a certain way,” the School Board describes that the point of the initiative “is to show that there is no one ‘right’ or ‘normal’ way to be.” *Id.* at *6. The School Board cannot plausibly argue that a curriculum designed to show kids that there is no one “right” way to be, has no conflict with religious education that may very well believe in a single right way to be. Moreover, the proposed “think aloud” moments further demonstrate that the initiative is designed to encourage specific ideas. For example, the storybook *Prince & Knight* is supposed to help a student wonder “how he might feel about the pressure his parents are putting on him to find a princess,” and teachers are encouraged to point out in *Born Ready* that “we know ourselves best.” *Id.* The clear instructional goals of the storybooks undermine any argument that the initiative is aimed at mere exposure.

Second, the district court agreed with the School Board that an opt-out for religious parents is unnecessary because while the storybooks may contain objectionable instruction, those storybooks are only “a small subset of many books used” in the curriculum and do not constitute a “constant stream of like materials.” *Id.* at *21. In other words, according to the district court, even if the storybooks burden parents’ religious obligations to educate their children, the initiative passes constitutional muster because it does not create a “constant

stream” of religious burdens. That is not how constitutional protections work. An infringement on religious exercise is not rendered lawful because in the government’s opinion it is a minor infringement. The initiative is designed to impart messages surrounding family life and sexuality, those messages make it hard for some parents to educate their children in accordance with their religious principles; this is a burden on religious exercise, period. If anything, the fact that parents only want to opt out of a “small subset” of the materials makes it unlikely that the state has a compelling interest in refusing their request.

CONCLUSION

This Court should reverse the decision below and grant Plaintiffs a preliminary injunction.

Date: October 17, 2023.

Respectfully Submitted,

Howard Slugh
Counsel of Record
2400 Virginia Ave N.W.
Apt. C619
Washington, D.C., 20037
(954) 328-9461
Hslugh@JCRL.ORG
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2,791 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 17, 2023

/s/____Howard Slugh____

Howard Slugh